**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA**

Warnakulasuriya Irangani Tissera

of Weehena,

Mahawewa.

**Plaintiff**

**C.A. Case No. 374 / 2000 (F)**

DC Marawila Case No. 377/P

**-Vs-**

Mihindukulasuriya Vijes Tissera

of Weehena,

Mahawewa & 18 Others

**Defendants**

**And**

Kaduwelawimal Sebastian Victor,

No. 193,

Ihala Mahawewa,

Mahawewa.

**17th Defendant - Appellant**

**-Vs-**

Warnakulasuriya Irangani Tissera

of Weehena,

Mahawewa.

**Plaintiff - Respondent**

**And**

1. W. Vyes Tissera of Mahawewa
2. W. Lydwin Croos,
   Thoduwawa Road, Mahawewa
3. W. Walter Croos,
   Thoduwawa Road, Mahawewa
4. W. Nita Croos,
   Thoduwawa Road, Mahawewa
5. W. Norbert Croos,
   Thoduwawa Road, Mahawewa
6. W. Rex Croos,
   Thoduwawa Road, Mahawewa
7. W. Lynette Croos of Katuneriya
8. W. Premus Fernando of Katuneriya
9. W. Lynda Fernando of Katuneriya
10. W. Anestus Fernando of Katuneriya
11. W. Greta Tissera, Kammala, Waikkala

12.W. Padmarani Tissera, Kammala, Waikkala

13.W. Rayman Tissera, Kammala, Waikkala

14.K. Jeedia Nooria, Weehena, Mahawewa

15.W.N.P. Fernando, Weehena, Mahawewa

16.W.P.P. Fernando, Weehena, Mahawewa

18. K.A.I.S. Peiris, Weehena, Mahawewa

**Defendant - Respondents**

**And Now Between**

Kaduwelawimal Sebastian Victor,

No. 193,

Ihala Mahawewa,

Mahawewa.

**17th Defendant - Appellant**

**-Vs-**

Warnakulasuriya Irangani Tissera

of Weehena,

Mahawewa.

**Plaintiff - Respondent (Deceased)**

1. Willappraneiscuge Joseph Michael Felix Sovis,
   No. 21, "Rosita",
   Sovis Mawatha,
   Kalaeliya,
   Ja ela.

2. Keerthi Ranapriya Sovis,
   No. 21, "Rosita",
   Sovis Mawatha,
   Kalaeliya,
   Ja ela.

3. Mari Rosita Premani,
   No. 21, "Rosita",
   Sovis Mawatha,
   Kalaeliya,
   Ja ela.

4. Wimal Thejasiri Sovis,
   No. 21, "Rosita",
   Sovis Mawatha,
   Kalaeliya,
   Ja ela.

   **Substituted - Plaintiff - Respondents**

**And**

1. W. Vyes Tissera of Mahawewa
2. W. Lydwin Croos,
   Thoduwawa Road, Mahawewa
3. W. Walter Croos,
   Thoduwawa Road, Mahawewa
4. W. Nita Croos,
   Thoduwawa Road, Mahawewa
5. W. Norbert Croos,
   Thoduwawa Road, Mahawewa
6. W. Rex Croos,
   Thoduwawa Road, Mahawewa
7. W. Lynette Croos of Katuneriya
8. W. Premus Fernando of Katuneriya
9. W. Lynda Fernando of Katuneriya
10. W. Anestus Fernando of Katuneriya
11. W. Greta Tissera, Kammala, Waikkala
12. W. Padmarani Tissera, Kammala, Waikkala
13. W. Rayman Tissera, Kammala, Waikkala
14. K. Jeedia Nooria, Weehena, Mahawewa
15. W.N.P. Fernando, Weehena, Mahawewa
16. W.P.P. Fernando, Weehena, Mahawewa
18. K.A.I.S. Peiris, Weehena, Mahawewa

**Defendant - Respondents**

**BEFORE** : **A.H.M.D. Nawaz, J.**

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| **COUNSEL** | : | Janaka Balasooriya for the 17th Defendant-Respondent-Appellant. |
| | | Dr. Sunil Coorey with Ms. Narmada Nayanakanthi for the substituted 1st, 2nd & 3rd Plaintiff-Respondents. |
| **Argued on** | : | 13.03.2015 |
| **Decided on** | : | 12.10.2015 |

**A.H.M.D. NAWAZ, J,**

This appeal chronicles a narrative of how a partition action could be needlessly dismissed when it ought to have continued and demonstrates in the process how an erroneous use of Chapter 12 of the Civil Procedure Code in the course of a partition action could drive a coach and horses through the pith and substance of partition law.

**Factual Template**

By a plaint dated 21st October 1993, the Plaintiff-Petitioner-Respondent (hereinafter referred to as "the Plaintiff") instituted this action in the District Court of Marawila against 18 Defendants seeking *inter alia,* a decree of partition in respect of the land described in the Schedule to the plaint. The 17th Defendant-Respondent-Appellant (hereinafter sometimes referred to as "the Appellant") along with the 18th Defendant-Respondent filed a joint statement of claim dated 13th February 1997, seeking *inter alia,* the exclusion of certain portions of land from the subject matter in suit, depicted as lot 2 of the preliminary plan No. 4242. The 13th, 14th, 15th, 16tt and 19th Defendants too filed a joint statement of claim dated 12th June 1997.

The trial commenced on 5th March 1998 when the parties formulated 1 admission and 17 issues (vide page 98 of the appeal brief).

The examination in chief of Plaintiff-Warnakulasuriya Mary Violet Iranganie Thisera commenced her on 2nd April 1998, and she was subjected to cross-examination on behalf of the 13th, 14th, 15th and 19th Defendants. The 17th and 18th Defendants too began their cross-examination of the Plaintiff, which was not concluded on the said date, and was put off for 14th May 1998. On 14th May 1998, the Plaintiff had been present but her cross-examination could not take place as the attorney-at-law for the 13th, 14th, 15th and 19th Defendants was indisposed. When the trial was taken up for further cross-examination on 16th June 1998, the Plaintiff was absent on that date but her attorney-at-law, whilst informing court that he had not been communicated with any reason for the Plaintiff's absence, brought to the attention of court that the Plaintiff was a person who was prone to a heart ailment and so he moved for a date on behalf of the Plaintiff subject to costs, but this application was opposed by the Defendants who chorused in unison that it was not necessary for them to proceed with the trial.

I observe that the proviso to Section 70 of the Partition Law No. 21 of 1977 as amended (the Partition Law) states that in a case where a Plaintiff fails or neglects to prosecute a partition action, the court may, by order, permit any Defendant to prosecute that action and may substitute him as a Plaintiff for the purpose and may make such order as to costs as the court may deem fit. I hasten to point out that there was no evidence before the learned District Judge of Marawila that the Plaintiff had failed or neglected to prosecute the partition action as the Plaintiff had been present on the previous day but on the fateful day namely 16th June 1998 though she was not available for further cross-examination, her attorney-at-law

moved for a date on her behalf, albeit without any success. In any event the Defendants were all saying before the learned District Judge that they were not willing to proceed with the trial and in the attendant circumstances the proviso to Section 70 of the Partition Law No. 21 of 1977 couldn't have been activated by the learned District Judge as there was no evidence at all before Court that the Plaintiff failed or neglected to prosecute the partition action.

The application of the attorney-at-law of the Plaintiff for a date subject to costs met with opposition all-round from the Defendants and the learned District Judge by her order dated 16th June 1998 dismissed the plaint. Her order is as laconic as laconic can be-vide page 114 of the appeal brief. Two reasons have been cited by the learned District Judge in the main for the dismissal of the action namely no reason had been adduced as to why the Plaintiff was absent from court and the Defendants themselves had expressed no necessity to proceed with the trial. Though the learned District Judge does not state in so many words, the implication of her order is that she had treated the absence of the Plaintiff from court as a default though the Counsel for the Plaintiff notified the judge that the Plaintiff was prone to a heart ailment. For reasons which fortify me, I would express the opinion that the learned District Judge could not have treated the absence of the Plaintiff as a default and thus dismissed her action.

At this stage I wish to point out that the dismissal of the plaint is not the automatic option if the Plaintiff absents herself from court on an adjourned trial date. No doubt the consequence of dismissal of the action is prescribed in several sections of the Partition Law[1] but such a consequence is confined to specific instances stipulated in Section 75 of the Partition Law. Once the trial has begun, there are

[1] Section 75 of the Partition Law No 21 of 1977 as amended.

options that could be considered by a District Judge before he has recourse to the harsh sanction of a dismissal of the action.

Section 70 (1) of the Partition Law itself begins with a caveat-

*No partition action shall abate by reason of the non prosecution thereof.*

Non prosecution of the partition action without reasonable diligence will predicate a dismissal, in terms of this subsection, only after the court has endeavored to compel the parties to bring the action to a termination. The subsection requires the District Judge to endeavor to compel the parties to a finish and the spirit of Section 70 (1) of the Partition Law was not borne in mind by the learned District Judge when she proceeded to dismiss the plaint on 16th June 1998. Moreover here was a Plaintiff who subjected herself to cross-examination and was present on the following day but was absent on the adjourned next date for one reason or other and her attorney did move for a date, notwithstanding her absence. The absence of a Plaintiff who had offered herself for cross-examination but absented herself on an adjourned date cannot amount to a neglect or failure to prosecute the action unless there was compelling enough a reason for such a conclusion and it was too early in the day for the learned District Judge to form such an opinion that there was non prosecution on the part of the Plaintiff, especially when the attorney-at-law of the Plaintiff had moved for a date.

It is my view that a Plaintiff as in this case could not have been subjected to a sanction of a dismissal of her action, having regard to the fact that she was available for cross-examination on 14th May 1998, after having been cross examined on 2nd April 1998, but could not present herself on the next date 16th June 1998. The presence of the Plaintiff's attorney-at-law in Court on 16th June 1998 and his act of moving for a date on her behalf constituted her presence and act-see ***Gargial et al v***

***Somasundaram Chetty***[2]. In this case the Defendant was absent at the trial stage. The proctor moved for a postponement since the Defendant was abroad. The judge refused a date. The court heard evidence of the Plaintiff and entered judgment. The question arose in appeal with the trial was *ex parte* or *inter-partes*. The Supreme Court held that it was *inter-partes* on the basis that the Proctor for the Defendant must be taken to have appeared for the Defendant at the trial. Therefore there was no default of appearance on the part of the Defendant. The case must be reinstated.

The case which is on all fours with the case at bar would be ***De Mel v Gunasekera***[3] where it was held that if an advocate appeared and moved for a postponement then proceedings should be considered as *inter-partes*. In ***Perumal Chetty v Goonetilleke,***[4] the Supreme Court observed that there is no requirement for the Defendant to appear personally and it is sufficient if he is represented by counsel. Thus I am of the view that even if the presence of the Plaintiff was necessary on 16th June 1998, the Plaintiff could not have been visited with a dismissal of her action.

None of these principles were borne in mind by the learned District Judge when the erroneous order to treat the absence of the Plaintiff from court as a default was made on 16th June 1998. There could not have been a dismissal of the plaint in those circumstances. Neither the Partition Law nor the underlying principles of civil procedure would ever sanction the course of action that the learned District Judge adopted.

It cannot be stated as if there was no provision in the partition Law to grant a date subject to cost as the Counsel for the Plaintiff implored on the fateful day. If the learned District Judge were to compel the parties to bring to a close a partition

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[2] 9 N.L.R 26
[3] 41 N.L.R 33
[4] (1908) Bal 2

action, it is implicit therein that the learned Judge should have condescended to the grant of a date. Even if one were to argue that an adjournment was not expressly provided for in the Partition Law having regard to the facts and circumstances of the case, Section 79 of the Partition Law provides a way out to this *casus omissus*.

Section 79 of the Partition Law 21 of 1977 as amended sets out the following:-

> *In any matter or question of procedure not provided for in this Law, the procedure laid down in the Civil Procedure Code in a like matter or question shall be followed by the court,* ***if such procedure is not inconsistent with the provisions of this Law.***

The trial stood adjourned for further cross-examination of the Plaintiff on 16th June 1998 and the Plaintiff was absent on the said date. A recourse to the Civil Procedure Code via the *casus omissus* provision (section 79 of the Partition Law) takes one to Section 144 of the Civil Procedure Code which states as follows:-

> *"If on any day to which the hearing of the action is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the action in one of the modes directed in that behalf by Chapter XII, or* ***make such other order as it thinks fit.***"

So the District Judge is left with discretion to adopt one of two options. Either she follows the procedure spelt out in Chapter XII of the Civil Procedure Code or she makes such other order as she thinks fit.

Recourse to Chapter XII of the Code should not be a mechanical and automatic choice as the District Judge is also empowered to make such order as she thinks fit. She has to have regard to the other provisions in the Code that enable a party to prosecute his or her action. The exercise of this discretion assumes a greater

importance having regard to a partition action where a Plaintiff seeks to establish a right in rem; In choosing the option left to the discretion the learned District Judge must have regard to Section 91A (3) of the Civil Procedure Code which quite specifically states-

> *"The court may, for sufficient cause, either on the application of the parties or of its own motion, advance, postpone or adjourn the trial to any date upon such terms as to costs or otherwise as to it shall seem proper."*

In fact in the context of a Defendant Justice Mark Fernando alluding to Section 91A stated in ***ABN-AMRO Bank N.V v Conmix (Private) Limited and Others***[5] that a discretion is available to a judge under the said section to grant further time to a Defendant who has failed to file answer and this is so even if the Plaintiff objects. Section 91A (3) extends this discretion to be exercised in favor of any party.

None of these provisions *though* were borne in mind by the learned District Judge when she came to make the order of dismissal as she did on 16th June 1998 by a stroke of a broad brush giving the bum's rush to the all important criterion given in Section 144 of the Civil Procedure Code-

> *".....The court may proceed to dispose of the action in one of the modes directed in that behalf by Chapter XII, or* ***make such other order as it thinks fit.***"

In a nutshell I conclude that there was no default of appearance on the part of the Plaintiff on 16th June 1998 because the attorney-at-law of the Plaintiff appeared for her and sought an adjournment. In the circumstances there could not have been an order of dismissal of the plaint. Even the Partition Law promotes the prosecution of

[5] 1996 (1) Sri.LR 8

the action through the proactive role of the District Judge in endeavoring to compel the parties to bring to an end the partition action.

Even the *casus omissus* provision which takes the Court to provisions such as Sections 144 and 91A (3) of the Civil Procedure Code does not precipitate a dismissal of the plaint as such a course of action is inconsistent with the provisions of the Partition Law which stipulate a dismissal only in extreme circumstances-please see Section 75 of the Partition Law.

From the foregoing I hold that a recourse to a dismissal of the action in terms of Section 84 of the Civil Procedure Code and without any adjudication of the Plaintiff's rights, merely because the Plaintiff absents herself on the trial date, should be hardly adopted as the learned District Judge would in the circumstances abdicate the duty of investigation of title which is cast upon her and I hark back at this stage to the case of ***Dingiri Amma v Appuhamy***[6] which held on identical facts-

> *"Where a partition action is dismissed in terms of section 84 of the Civil Procedure Code on the ground of the nonappearance of the plaintiff on the trial date and without any adjudication of the plaintiff's rights, the order of dismissal would not operate as res judicata in a subsequent action brought by the plaintiff for the partition of the land"*

In fact I bear in mind the relevant *obiter* in ***Dingiri Amma v Appuhamy***[7] that the provisions of chapter 12 of the Civil Procedure Code relating to the consequences of defaults in appearing have no application at all the partition action.

If a plea of *res judicata* were not to defeat a subsequent action on the part of the Plaintiff, it goes without saying that there was no proper adjudication in the early

[6] 72 N.L.R 347, (1969) 77 CLW 107
[7] ibid

case and this fortifies my view that dismissal of the action should be sparingly resorted to as the learned District Judge is under an obligation to pay heed to Section 25-the overarching pivot of Partition Law as enjoined in cases such as ***Juliana Hamine v Don Thomas***.[8]

The pith and substance of promoting the spirit behind the Partition Law lie in the District Judge's role in his/her endeavor to bring the parties to trial and terminate proceedings as the final decree is dispositive of parties' right against the whole world. Towards the end the grant of a date even subject to costs is a course of action that cannot be characterized as an erroneous exercise of discretion and one is reminded of that perennial dictum-cost is a panacea for all ills. I am of the opinion that the Court should have granted a further date to the Plaintiff notwithstanding the concerted objections of the Defendants. In fact when a Plaintiff fails or neglects to prosecute a partition action, the proviso to Section 70 (1) of the Partition Law enjoins that the court may by order, permit any Defendant to prosecute that action and may substitute him as a Plaintiff for the purpose and may make such order as to costs as the court may deem fit. Thus the dual capacity of the Defendant as a Plaintiff in a partition action cannot be overemphasized and the learned District Judge of Maravila should have rejected the united objections of the Defendants on 16th September 1998 and adjourned the trail to another date in order to discharge the duty of title investigation enjoined upon her-see ***Bandi Naide v Appu Naide***[9] for the proposition of dual capacity of the Defendant as a Plaintiff.

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[8] 59 N.L.R 546.
[9] (1923) 5 CL Rec 192.

**Purging of default by the Plaintiff**

Be that as it may, the Plaintiff swung into action by filing a petition and affidavit to purge her default. The inquiry to cure the default commenced before the succeeding judge in the District Court of Marawila. At the enquiry both the Plaintiff and her daughter-in-law- a doctor by profession give evidence in order to have the order of dismissal set aside. The daughter-in-law of the Plaintiff gave convincing evidence as to what had happened on 16th June 1998 the day when the Plaintiff's case was dismissed. According to the daughter-in-law, the Plaintiff who lived in Ja-ela had been brought down to their residence by her husband the previous night in order to enable her to attend the trial scheduled for the following day. But in the morning of 16th June 1998 the Plaintiff had fallen onto a chair and when the doctor rushed to the scene upon the cry of her son that the grandmother had collapsed, she found the Plaintiff having high blood pressure and complaining of giddiness. After having given the Plaintiff some emergency treatment, the witness drove her to the Kuliyapitiya hospital which according to witness at better facilities than the closer hospital in Chilaw and had her examined at the outpatient department. Under cross-examination the witness was quick to point out that if the Plaintiff had attended court in her condition, the condition would have worsened. In response to the particular question from defence counsel as to why they did not inform counsel of the condition of the Plaintiff the witness stated that the home condition on the trial date was in such state of disarray that what was uppermost in their mind was the restoration of health of the Plaintiff. The version of the Plaintiff was amply corroborated by the daughter-in-law and upon a careful scrutiny led at the inquiry I have no reason to doubt the version that the Plaintiff was seriously ill and taken to the hospital on 16th June 1998. In fact the daughter-in-law of the Plaintiff asserted

that the Plaintiff generally fell ill whenever the day fix for the trial came around and the daughter-in-law who testified that it was she who attended to the mother-in-law-the Plaintiff. Merely because the witness happened to be the daughter-in-law of the witness, the allegation of bias does not bear any scrutiny as the witness was quite convincing as to what had happened on 16th June 1998. I cannot simply ignore the test of means of knowledge that is usually employed in the assessment of credibility of a witness. This witness had the best means of knowledge of the onset of frequent illness of the Plaintiff and she gave direct evidence of her means of knowledge as she was the best witness to proffer that evidence. I do not hold the view that the evidence of this witness can be disregarded and when the learned District Judge of Marawila restored the case back to trial, I have no doubt that he came to the correct finding. Another argument was raised on behalf of the Appellant that the learned District Judge failed to consider the validity of the medical certificate that was produced in proof of the Plaintiff's position since the self-same medical certificate was issued not by the doctor who examined the Plaintiff at the outpatient department but by the daughter-in-law of the Plaintiff. Be that as it may it is my view that there is nothing to dent the testimonial trustworthiness of the two witnesses who gave evidence at the purge-default inquiry. What is contemplated within Section 87 (3) of the Civil Procedure Code is the adduction of reasonable cause for the non-appearance of the Plaintiff on the day in question and I hold the view that there was material to induce satisfaction in court that the cause proffered by the Plaintiff was reasonable.

In the circumstances I proceed to affirm the order of the learned District Judge and dismiss the appeal with costs.

The learned District Judge of Marawila is directed to commence proceedings as from the stage at which the dismissal for default was made and endeavor to investigate title and bring to a close these proceedings as expeditiously as possible as this action was needlessly derailed as far back as 1998 owing to misconception of law attendant upon the facts.

**JUDGE OF THE COURT OF APPEAL**